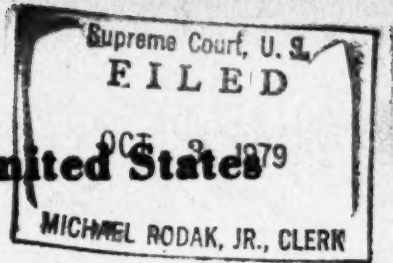


IN THE
Supreme Court of the United States



October Term, 1979

No. ~~...~~ **79-549**

WILLIAM BEVERLY SMART,

Appellant,

vs.

THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

1 Second District

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

WILLIAM BEVERLY SMART,

Appellant,

vs.

THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

William Beverly Smart appeals from the Order of the California Court of Appeal affirming his convictions for grand theft and attempted grand theft. The Opinion of the Court of Appeal was filed on April 12, 1979, and the California Supreme Court denied a timely Petition for Hearing on July 5, 1979.

The United States Supreme Court has jurisdiction of this appeal, and a substantial question is presented.

OPINION BELOW

The Opinion of the Court of Appeal of the State of California for the Second Appellate District is unreported. A copy of that Opinion, along with a copy of the postcard from the California Supreme Court notifying appellant of its denial of a hearing, are attached hereto as Appendices "A" and "B", respectively.

JURISDICTION

William Beverly Smart was prosecuted, *inter alia*, for grand theft in the Superior Court of the State of California. His convictions for grand theft and attempted grand theft resulted in a state prison sentence and were affirmed by the California Court of Appeal for the Second Appellate District on April 12, 1979. The California Supreme Court denied a hearing on July 5, 1979, and Notice of Appeal was filed in both the Superior Court and the Court of Appeal¹ on September 27, 1979 (copies of Notices are attached hereto as Appendices "C" and "D", respectively).

The jurisdiction of the Supreme Court to review this matter on appeal is conferred by Title 28, United States Code, Section 1257(2). The jurisdiction of the Supreme Court to review this matter on appeal is supported by *Largent v. Texas*, 318 U.S. 418 (1943).

¹It not being clear which court—at the time of filing—was the "court possessed of the record" within the meaning of Rule 10(3), United States Supreme Court Rules.

QUESTIONS PRESENTED²

1. Does a state penal code provision which allows communication by the trial judge to the jury out of the presence of the defendant and his counsel upon a waiver of their presence by his counsel violate the defendant's right to be present and represented by counsel at all stages of the proceedings against him?

2. Does the denial of a request for postponement of sentencing to enable a defendant to move for a new trial and to refute a probation report deny him due process when it appears that a person involved in the crimes of which the defendant has been convicted is, for the first time, willing to testify, and that the probation report contains facts denied by the defendant?

STATUTE INVOLVED

California Penal Code § 1138 provides:

"After the jurors have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required

²This case presents two questions, only the first of which appellant understands to be within the Court's appeal jurisdiction. It is submitted that the second question—which involves a question of federal constitutional law—is cognizable on appeal as pendant to the first. However, if this matter is not considered by the Court to be within its appeal jurisdiction, it is requested that this Jurisdictional Statement be considered as a Petition for Writ of Certiorari.

must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

STATEMENT OF FACTS

After a lengthy trial which resulted in the two convictions at issue here, as well as acquittal and mistrial on two other counts, the jury retired to deliberate. During its deliberations, the jury sent a note containing a question to the trial judge. The clerk contacted appellant's trial counsel and informed him of the contents of the note, as well as the court's proposed reply. Counsel agreed that the question could be answered without he or his client being present.

According to the record, appellant was not notified of the jury's question, of the court's proposed response, or of his right to be present. He did not waive that right or his right to be represented by counsel at the time of the jury's inquiry and the court's response.

At the time set for sentencing and new trial motion, appellant's counsel requested a continuance. His request was based on two grounds. First, he indicated that a former co-defendant, who had earlier refused to testify, was now willing to give exculpatory evidence on appellant's behalf, and that because the proposed witness was in federal custody, time would be needed to obtain his affidavit. Second, he requested time to prepare to refute the false testimony in the probation report which had only been delivered to him that morning. The motion for continuance was denied.

The "jury communication question" presented here was first raised in the Court of Appeal, both in the Appellant's

Opening Brief and in a Petition for Rehearing. Appellant's argument that the procedure provided for by Section 1138 of the Penal Code violated his federal constitutional rights was summarily rejected by the Court of Appeal, which stated that "[t]he procedure here followed was that prescribed by the statute" (Appendix "A" p. 3).

The jury communication question was again raised in the California Supreme Court by Petition for Hearing. The Supreme Court declined to hear the case without issuing an opinion or otherwise stating its reasons.

The "sentencing postponement question" presented here was first raised in the trial court by defense counsel's request for a continuance of appellant's probation and sentencing hearing and his argument in support of that request. Counsel argued that he was not yet able to provide appellant with the effective assistance of counsel guaranteed to him and was unprepared to meet the allegations in the probation report (Reporter's Transcript at pp. 2071, 2074-75). Appellant's motion for a continuance was denied.

The sentencing postponement question was raised in the Court of Appeal both in the Appellant's Opening Brief and in the appellant's Petition for Rehearing. Appellant's argument that the trial court's denial of his motion for a continuance denied him due process and effective assistance of counsel was rejected by the Court of Appeal: "We cannot say that the trial court abused its discretion in denying the requested continuance" (Appendix "A" p. 4).

The sentencing postponement issue, like the jury communications issue, was raised in appellant's Petition for Hearing in the California Supreme Court. It, too, was rejected by the Court's denial of a hearing.

THE QUESTIONS ARE SUBSTANTIAL

This case presents two questions touching upon the procedural rights guaranteed to criminal defendants—in both state and federal courts—by the Constitution. Both communications with juries outside the presence of defendants and their counsel and sentences based upon erroneous facts are evils that our system purports to prohibit.

It is clear that the Sixth Amendment requires the presence of defendants and their counsel at all critical stages of the prosecution (*Mempa v. Rhay*, 389 U.S. 128 (1967); *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 352 (1961); *Shields v. United States*, 273 U.S. 583, 588 (1927); see *Harris v. United States*, 382 U.S. 162 (1963)) and that a defendant is entitled to a sentence based upon accurate information (see *United States v. Tucker*, 404 U.S. 443 (1972)) and to the assistance of counsel at sentencing (*Mempa v. Rhay*, *supra*, *Spect v. Patterson*, 386 U.S. 605 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948)).

Here, all three rights were abrogated. The court communicated with the jury outside the presence of appellant and his counsel and the California appellate court upheld such communication because the presence of appellant and his counsel was “waived” by the attorney.³ The trial court relied upon information at sentencing that appellant contended was inaccurate without giving him the opportunity to

³Of course, appellant did not join in that waiver. See *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Brookhart v. Janis*, 384 U.S. 1.

rebut that information, and did not give him time to prepare to do so or to present evidence in mitigation which his counsel needed additional time to develop.

It is established that an accused is entitled to the effective assistance of counsel at sentencing. As long ago as 1948, this Court pointed out the importance of counsel at sentencing:

"Counsel, had any been present, would have been under a duty to prevent the court from proceeding under such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted.

"It is not the duration or severity of the sentence that renders it constitutionally invalid; it is the careless or design pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceeding lacking in due process. . . .

"In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner."

Townsend v. Burke, supra, 334 U.S. at 740.

See also *Mempa v. Rhay, supra*, 389 U.S. at 135.

Here, the trial court's refusal to grant a continuance prevented counsel from preventing the imposition of a sentence predicated on misinformation, and prevented him from intro-

ducing evidence of mitigating circumstances.

CONCLUSION

"Where a jury has retired to consider its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they should be given either in the presence of defendant and his counsel, or after notice and an opportunity to be present; and written instructions ought not be sent to the jury without notice and an opportunity to object."

Shields v. United States, supra, 273 U.S.
at 588.

Here, California Penal Code Section 1138 has been interpreted to allow jury communication in the absence of the defendant, without a waiver of his right to be present, based upon nothing more than a telephone call by the court clerk to counsel. That construction of Section 1138 violates appellant's right to be present at all stages of the proceeding, as well as his right to counsel, and probable jurisdiction should be noted in this matter to review the decisions of the California courts herein.

Respectfully submitted,

HOWARD WEITZMAN

BURTON MARKS

BY: BURTON MARKS

Attorneys for Appellant

INDEX TO APPENDIXES

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APPENDIX "A"

OPINION OF THE COURT BELOW **(Not To Be Published In The Official Reports)**

In the Court of Appeal of the State of California,
Second Appellate District, Division Four.

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM
BEVERLY SMART, Defendant and Appellant.

2 CRIM. NO. 31796 (Super. Ct. No. A-329,212)

[Filed April 12, 1979]

APPEAL from a judgment of the Superior Court, Los
Angeles County. Delbert Wong, Judge. Affirmed.

George Deukmejian and Evelle J. Younger, Attorneys
General, Jack R. Winkler, Chief Assistant Attorney General,
S. Clark Moore, Assistant Attorney General, Norman H.
Sokolow and Howard J. Schwab, Deputy Attorneys General,
for Plaintiff and Respondent.

After a jury trial, defendant was convicted of, and
sentenced on: (count I) grand theft, in violation of section
487 of the Penal Code; and (count II) attempted grand theft,
in violation of sections 664 and 487 of the Penal Code. He
was sentenced to state prison, the sentences to run concur-
rently. He has appealed; we affirm.

I

On this appeal, defendant raises no issue as to the

sufficiency of the evidence to support the verdicts; consequently we need not here recount either the pleading amendments nor the evidence. His only contentions here are: (1) that he was denied speedy trial; (2) that he was denied the effective assistance of counsel; and (3) that he was improperly denied a continuance to prepare for a new trial motion. We reject all three contentions.

II

The case was continued, either at the request of defendant or with his consent, until May 25, 1977. When it was called on that day, neither defendant nor his counsel were present. The trial court read into the record a letter from defense counsel's doctor, stating that counsel was ill and would be unable to appear for trial for 10 days to two weeks. Counsel for a codefendant was also absent, but had indicated that he would appear later. After a discussion, and with the express consent of the codefendant and defendant, the case was continued until June 15, 1977.

Defendant here argues that, since he was not then represented by counsel, he was entitled to the express statement of rights prescribed by section 1382 of the Penal Code and that that statement had not been given to him. We need not, and do not, determine the issue thus raised. The trial court correctly found that the situation was such as to give good cause for the continuance. The case had already been continued for a substantial period of time with the consent of defendant; it was estimated to take five to eight weeks for trial¹; the presence of counsel was an obvious necessity; a

¹The reporter's transcript, which is before us, consists of 883 pages.

continuance until he was able to appear was clearly called for; defendant's consent was unnecessary.

III

After the jury had retired, they sent in a note asking for a clarifying instruction. Neither defendant nor their respective counsel were then present; the trial court telephoned each counsel, advised them of the jury's request, and secured consent to proceed in the absence of counsel or defendant. We see no error.

The statutory provision applicable to such a situation is set forth in section 1138 of the Penal Code, which reads as follows:

"After the jury have retired for deliberation, if there by [*sic*] any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

The procedure here followed was that prescribed by the statute. In the absence of any showing that the answer given was erroneous, we can see no prejudice to the defendant. (*Cf. People v. Alcalde* (1944) 24 Cal. 2d 177.)

IV

On September 23, 1977, when defendant's motion for a new trial came on for hearing, his counsel stated that, a few days before September 8th, he was advised that someone had talked to a man named Noday, who had been a partici-

pant in the transactions leading to defendant's conviction and who was then imprisoned in the federal prison at Leavenworth, Kansas, and that that individual had stated that Noday, if interviewed by an attorney at the prison, would give an affidavit favorable to defendant. A request for a continuance to secure such an affidavit was denied. We see no error.

Not only was there no explanation for the 17 to 18 day delay in contacting Noday, but, having only the out-of-court statement of the third party, whether Noday would, in fact, give the hoped-for affidavit was purely speculative. We cannot say that the trial court abused its discretion in denying the requested continuance.

The judgment is affirmed.

NOT FOR PUBLICATION IN THE OFFICIAL REPORTS.

KINGSLEY, Acting P.M.

We concur:

JEFFERSON (BERNARD), J.

ALARCON, J.

APPENDIX "B"

5.

POSTCARD DENIAL OF A HEARING

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

JUL 5 1979

I have this day filed ORDER _____

HEARING DENIED

In re: 2 Crim. No. 31796

People

vs.

Smart

Respectfully,

G. E. BISHEL
Clerk

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

In the Superior Court of California, County of Los Angeles.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff
and Respondent, v. WILLIAM BEVERLY SMART, Defendant and Appellant.

No. A 329212.

[Received September 27, 1979]

Notice is hereby given that William Beverly Smart, the appellant in this action, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of the State of California, denying a hearing to review the Judgment of Conviction, entered in this matter on July 5, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: September 27, 1979.

BURTON MARKS
HOWARD WEITZMAN
BY: BURTON MARKS

[Affidavit of Service attached showing service made as follows:

California Attorney General	The Honorable Delbert E. Wong
3580 Wilshire Boulevard	Los Angeles Superior Court
Los Angeles, CA. 90010	210 West Temple, Los Angeles, CA. 90012
Los Angeles County District Attorney	
210 West Temple Street	
Los Angeles, CA. 90012]	

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

In the Court of Appeal of the State of California.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff
and Respondent, v. WILLIAM BEVERLY SMART, Defendant
and Appellant.

No. 2d CRIM 31796; Superior Court No. A 329212.

[Received for filing September 27, 1979]

Notice is hereby given that William Beverly Smart, the appellant in this action, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of the State of California, denying a hearing to review the Judgment of Conviction, entered in this matter on July 5, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: September 27, 1979.

BURTON MARKS

HOWARD WEITZMAN

BY: BURTON MARKS

[Affidavit of Service attached showing service made as shown on the Notice of Appeal forwarded to the Superior Court, Appendix p. 6, *supra*.]

THE
OFFICE OF THE
SHERIFF
COUNTY OF
NEW YORK
IN SENATE
JANUARY 1891

IN SENATE
JANUARY 1891
COUNTY OF
NEW YORK
SHERIFF
OFFICE

THE
OFFICE OF THE
SHERIFF
COUNTY OF
NEW YORK
IN SENATE
JANUARY 1891

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on OCTOBER 2, 1979, I served the within JURISDICTIONAL STATEMENT (WILLIAM BEVERLY SMART vs. THE STATE OF CALIFORNIA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, Court of Appeal
Second Appellate District
3580 Wilshire Boulevard
Los Angeles, Ca. 90010
1 copy

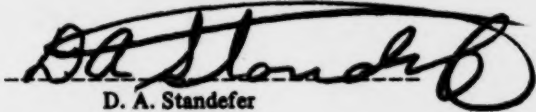
The Honorable Delbert E. Wong
Los Angeles Superior Court
210 West Temple Street
Los Angeles, Ca. 90012
1 copy

California Attorney General
3580 Wilshire Boulevard
Los Angeles, Ca. 90010
3 copies

Los Angeles County District Attorney
210 West Temple Street
Los Angeles, Ca. 90012
1 copy

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 2nd, 1979, at HUNTINGTON BEACH, CALIFORNIA.


D. A. Standefer

41 COPIES TO U. S. SUPREME COURT, WASHINGTON, D. C.
together with Check No. 1401 of Burton Marks, in the amount
of \$100.00, as docket fee, attached to original copy of the
aforesaid Jurisdictional statement.

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161